APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

NO. 81-1092

Douglas W. Thompson, *Appellant*, v. Carl White, Superintendent, Missouri Training Center for Men. *Appellee.*	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: July 23, 1981

Filed: October 14, 1981

Before LAY, Chief Judge, STEPHENSON and McMILLIAN, Circuit Judges.

STEPHENSON, Circuit Judge.

Douglas W. Thompson, a Missouri state prisoner, appeals from the district court's[1] denial of his habeas corpus petition filed under 28 U.S.C. § 2254. He contends that he was denied a fair trial because of the jury selection technique used in his 1966 conviction by a Mississippi County,

[1]The Honorable Edward L. Filippine, United States District Judge, Eastern District of Missouri.

Missouri, court.[2] We reverse the judgment of the district court and remand for a new trial.

In 1961, Thompson was convicted and sentenced to death for the March 10, 1961, shooting death of a Cape Girardeau, Missouri, policeman.[3] After an unsuccessful direct appeal of his conviction, *State* v. *Thompson*, 363 S.W.2d 711 (Mo. En Banc 1963) (Thompson I), Thompson's family secured counsel and succeeded in obtaining a new trial through a rule 27.26, Mo. Rev. Stat. petition based on the state's suppression of material evidence. *State* v. *Thompson*, 396 S.W.2d 697 (Mo. En Banc 1965) (Thompson II).

A new trial was held in 1966, in Mississippi County, Missouri. Thompson was again convicted in December 1966, but this time was sentenced to a life term. There was no direct appeal of this conviction.

On September 10, 1975, Thompson filed for relief in the Missouri state court under rule 27.26, Mo. Rev. Stat. In this motion he alleged that (1) he was convicted on the basis of false and perjured testimony and the remaining evidence was not sufficient to sustain a conviction; (2) he was convicted in violation of double jeopardy; (3) the Missouri County jury was unconstitutionally selected; (4) the jury was improperly instructed on the law of the case; and (5) the trial court refused to provide him with a copy of the jury instructions.

The motion was denied on June 22, 1977, without a hearing. The Missouri Court of Appeals affirmed on all

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[2]Petitioner was paroled from the life sentence from which he now appeals. He was sent to California to serve a prior California sentence. California has since vacated his sentence and he is now free.

[3]Sammy Tucker, a fellow defendant, was also convicted and sentenced to death for the death of another policeman arising out of the same incident. Tucker was executed.

issues except that concerning the jury selection. This issue was remanded for an evidentiary hearing. *Thompson* v. *State,* 576 S.W.2d 541 (Mo.App. 1978) (Thompson III).[4]

On October 21, 1977, before the state trial court had ruled on the remanded issue of jury selection, Thompson filed the instant petition for federal habeas relief. In it he renewed his claims concerning the use of perjured testimony, the lack of credible evidence, double jeopardy violations, and improper jury selection. The district court dismissed the petition for failure to exhaust state remedies. Our court affirmed the dismissal of the jury selection claim for failure to exhaust, *Thompson* v. *White,* 591 F.2d 441, 443 (8th Cir. 1979), but reversed and remanded the other issues in light of the Missouri Court of Appeals opinion in *Thompson* v. *State, supra,* 576 S.W.2d 541, which was renderd after the federal district court's opinion and which dealt with those issues.

On February 26, 1979, Thompson filed an amended federal habeas petition restating his claim concerning the use of perjured testimony, lack of credible evidence and double jeopardy violations. On March 10, 1980, before the district court rendered an opinion on this petition, Thompson moved for removal of the jury selection issue from the state court to the federal district court on the grounds that the state had deliberately stalled and delayed the

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[4]The court ruled that defendant deliberately, voluntarily and knowledgeably bypassed his right of direct appeal in order to avoid the possibility of the death penalty. The court ruled that this bypass disposed of Thompson's allegations of instructional error and of the failure to provide him with a copy of the instructions. The court ruled that because the allegation of the use of perjured testimony was identical to the allegation before the Missouri Supreme Court in 1965, it was precluded by that ruling. The court held the claim of insufficient evidence was not cognizable in a rule 27.26 proceeding. The court overruled the double jeopardy claim on the basis of the trial record.

progress of the case. Thompson argued that it was no longer necessary to pursue a remedy in the state court because of this stalling and delay in light of our holding in *Mucie* v. *Missouri State Department of Corrections*, 543 F.2d 633 (8th Cir. 1976).

On October 14, 1980, the parties filed a stipulation in the federal habeas action now before us stating that the sheriff of Mississippi County would testify that he personally selected the jury panel. The stipulation stated that in December 1966, the Mississippi County circuit judge issued a special venire facias directing Sheriff Simmons to summon approximately seventy-two citizens for jury service on December 20, 1966, for the trial of Thompson. Sheriff Simmons personally selected potential jurors on the basis of people he knew whom "he thought would make good jurors," would answer the voir dire examination "truthfully" and were at least twenty-one years old with no criminal convictions. Simmons also knew that the defendant was charged with the murder of a police officer. The stipulation recited the fact that Simmons would testify he chose approximately seven blacks as prospective jurors.

As previously indicated, petitioner was found guilty by the jury and received the sentence of life imprisonment attacked in these proceedings.

The district court, after considering the magistrate's report and recommendation, dismissed all the claims for relief. The court dismissed the jury claim on the grounds that a prima facie case of discrimination was not established by proof that the court failed to use a random jury selection procedure. The court held that a prima facie case is established only when a lack of a random jury selection exists in conjunction with an indication or actual discrimination through exclusion of an identifiable group. The court

also dismissed the claim on the grounds that the underrepresentation of blacks was not sufficient to establish a prima facie case of discrimination.

The sole issue before us is whether the district court erred in its dismissal of the jury selection issue.

The state argues that we are precluded from reviewing the jury selection claim because of Thompson's failure to object at the time of his trial. Thompson responds that he was unaware of the standards concerning the selection of jurors because, at that time, the cases enunciating the standards had not yet been decided. Also, Thompson claims that it was unknown to all the parties that the sheriff had deviated from the statutory random selection procedure.[5] In fact, it was not until counsel was appointed by the federal district court in the instant case that the parties discovered the problem and entered into the stipulation which reveals that the entire jury panel was selected by the sheriff.

The bar of a state contemporaneous rule is not absolute. Under the rule enunciated by the Supreme Court, such a bar can be lifted if adequate cause for the failure to object exists and prejudice to the defendant can be shown. *Wainwright* v. *Sykes*, 433 U.S. 72, 80-91 (1977); *Francis* v. *Henderson*, 425 U.S. 536, 542 (1976).

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[5]The Missouri code outlines the procedure for the selection of juries. It states that the clerk of the circuit court and the judges of the county court constitute a board of jury commissioners for designated counties. Mo. Rev. Stat. § 494.230. The board selects four hundred names of qualified persons. The names of these persons are put on separate slips of paper and "placed in a box with a sliding lid * * * and thoroughly mixed." *Id.* at section 494.240.

The code then calls for the clerk of the board "so situated as to be unable to see the names on such slips" to publicly draw the names of the jurors. *Id.* at section 494.250. If a jury is discharged and it is necessary to have another jury during that term, the court may order the sheriff to summon qualified citizens to serve as the jury panel from which a jury may be selected. *Id.* at section 494.240.

In the present case both factors are satisfied. In light of the fact that Thompson did not know nor had reason to suspect that the statutory procedure was not being followed, he certainly had "cause" not to object. We also recognize that the "grizzly choice" between life imprisonment and execution facing Thompson provided him with an additional incentive not to appeal. *See Fay* v. *Noia*, 372 U.S. 391, 439-40 (1963). As will be discussed at length later in the opinion, we also find that prejudice existed because the sheriff personally selected the veniremen for the trial of an individual accused of killing another law enforcement officer.[6]

Turning to the issue of whether the jury selection entitled the defendant to relief, we are faced with two recent opinions of our court on this subject. In *Henson* v. *Wyrick*, 634 F.2d 1080 (1980), *cert. denied*, 101 S.Ct. 1417 (1981), we held there was prejudice where the sheriff who was in charge of the investigation which led to the arrest of the defendant selected the jurors to fill vacancies on the panel. *Henson* provided an excellent discussion of

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[6]We recognize that the state trial court has not yet dealt with the jury selection question which we refused to consider in 1979, on the basis that Thompson had not exhausted his state remedies. *Thompson* v. *White*, 591 F.2d 441, 443 (8th Cir. 1979). We hold that exhaustion no longer calls for our abstention. Exhaustion is a rule of comity. *Fay* v. *Noia*, 372 U.S. 391, 415-26 (1963). All that we require is that a state be given "one full and fair opportunity to decide a question * * *." *Eaton* v. *Wyrick*, 528 F.2d 477, 480 (8th Cir. 1975). We do not require a petitioner to pursue relief by filing repetitious or futile applications, *Rodgers* v. *Wyrick*, 621 F.2d 921, 924 (8th Cir. 1980), or where the state has unduly delayed the proceedings. *Mucie* v. *Missouri State Dept. of Corrections*, 543 F.2d 633, 635-36 (8th Cir. 1976).

In light of the delays by the state, ample opportunity has been afforded the state to deal with his case and we see no reason to continue to force defendant to pursue a remedy in state court. *Id. See Thompson* v. *White*, *supra*, 591 F.2d at 443.

the polices that bore on our decision to find undue prejudice.[7]

Subsequent to *Henson*, in *Holt* v. *Wyrick*, 649 F.2d 543, 546 (1981), we found that the selection of supplemental jurors by a sheriff in a neighboring county was not prejudicial. We distinguished *Henson* on the grounds that the

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[7]In *Henson* we held:

> This court's statements in *Ross* [*Ross* v. *Wyrick*, 581 F.2d 172 (8th Cir. 1978)] about the potential for officers to abuse their discretion in selecting jurors echoed the long-standing concerns of other federal courts.
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> • • •
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> Congressional concern for fundamental fairness in the method of selecting bystander jurors has caused federal selection methods to evolve from one of marshals selecting bystanders from persons present in the court to a method of random selection from specified lists in a manner ordered by the court. This legislative change was prompted in large part by congressional desires to eliminate "subjective screening" of potential jurors.
>
> Furthermore, many state courts have also expressed concern over the unbridled discretion of officials in the selection of bystander jurors.

Henson v. *Wyrick*, 634 F.2d 1080, 1082-83 (8th Cir. 1980), *cert. denied*, 101 S.Ct. 1417 (1981) (citations and footnotes omitted).
We concluded:

> The constitutional defect in Henson's jury is that the sheriff hand-picked his acquaintances to complete the venire panel. That some jurors were acquaintances of the sheriff would not itself invalidate the conviction. Also, that the court allowed some discretion in the selection of jurors would not invalidate the conviction. In this case, however, the sheriff exercised his discretion to ensure that only his acquaintances would fill venire panel vacancies.
>
> The potential for a conviction prone jury under such a system is substantial. Although perhaps not directly involved in the investigation of Henson's crime, the sheriff was the immediate supervisor of the deputies in charge of the case. Regardless whether the sheriff had spoken with his deputies about the case or had formed an opinion as to Henson's guilt before the trial, there is a great potential for the sheriff to hand-pick jurors sympathetic to the prosecution. Where, as here, the jurors are picked according to the sheriff's subjective rather than objective criteria, the oppor-

(*Continued on next page*)

sheriff who conducted the investigation did not choose the jurors.[8]

Our present case is much closer to *Henson* than *Holt*. While we have a sheriff, other than the one who investigated the shooting, selecting the jurors, we have two other extremely prejudicial factors. First, the victim of the shooting was a law enforcement officer. The sympathy that the sheriff would feel for a fellow officer and his family would provide "great potential for the sheriff to hand-pick jurors

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Footnote continued

tunity for the sheriff to express his allegiance to the prosecution by selecting sympathetic jurors is unlimited. In such situations, there is considerable risk that the bystander jurors will mirror the sheriff's own biases.

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We conclude that Henson was denied due process and a trial by a fair jury.

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[F]undamental fairness to the defendant requires some method better designed to obtain an impartial jury than the sheriff hand-picking among his acquaintances.

Id. at 1084-85 (citations omitted).

[8]We held in *Holt*:

This court's decision in *Henson* v. *Wyrick*, *supra*, likewise does not require reversal. In that case, the sheriff, whose subordinates investigated the crime and made the arrest, hand-picked the additional jurors from among his acquaintances. We granted habeas corpus relief because there existed the danger of a "conviction-prone" jury because of the "great potential for the sheriff to hand-pick jurors sympathetic to the prosecution."

In this case, however, the facts differ significantly from those in *Henson*. First, the sheriff's office in neighboring Pemiscot County, rather than the New Madrid County sheriff's office, conducted the investigation. • • • Equally important, Holt presented no evidence that the sheriff selected only his acquaintances for the jury.

Although we express concern with the fundamental fairness in this method of selecting bystander jurors, the record in this case discloses no basis for inferring a deprivation of due process. Accordingly, we reject Holt's contention.

Holt v. *Wyrick*, 649 F.2d 543, 546 (8th Cir. 1981).

sympathetic to the prosecution." *See Henson* v. *Wyrick, supra,* 634 F.2d at 1084. Second, the sheriff selected the entire jury panel. Unlike *Henson* or *Holt* which involved the selection of supplemental jurors, we are faced with the possibility that the entire panel would be unduly "sympathetic to the prosecution." As in *Henson,* the danger of a "conviction-prone" jury in such a situation is simply too great. The prejudice that exists in this case requires a vacation of Thompson's conviction.

We see no need to consider Thompson's other alleged bases for a new trial.

We reverse the denial of the petition for writ of habeas corpus. The conviction should be vacated and we remand for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1092

Douglas W. Thompson, *Appellant*, v. Carl White, Superintendent, Missouri Training Center for Men, *Appellee*.	Appeal from the United States District Court for the Eastern District of Missouri

Submitted: July 23, 1981

Filed: June 4, 1982

Before LAY, Chief Judge, STEPHENSON* and McMILLIAN, Circuit Judges.

PER CURIAM.

Douglas W. Thompson, a Missouri state prisoner, appealed the district court's denial of his habeas corpus petition filed under 28 U.S.C. § 2254. He contended that he was denied a fair trial because of the jury selection tech-

*The Honorable Roy L. Stephenson assumed the status of Senior United States Circuit Judge effective April 1, 1982.

nique used in his 1966 conviction by a Mississippi County, Missouri, court. Upon review, we reversed the judgment of the district court and remanded the case for a new trial. *Thompson* v. *White*, 661 F.2d 103 (8th Cir. 1981). The state appealed. The Supreme Court granted certiorari, vacated the judgment, and remanded the case to us for further consideration in light of *United States v. Frady*, 50 U.S.L.W. 4388 (1982). After reconsidering the case, we again reverse the judgment of the district court and remand for a new trial.

For a statement of the facts in this case see our earlier discussion. *Thompson* v. *White*, *supra*, 661 F.2d 103, 104-05.

In our original opinion we held that the Missouri contemporaneous objection rule did not bar Thompson from attacking the jury selection procedure used in his retrial, even though he failed to object to the jury selection procedure, because he demonstrated adequate cause for his failure to object and prejudice to him was shown. *Id.* at 105-07.

The Supreme Court held that the use of a "plain error" standard in reviewing a defendant's failure to object to a trial procedure in a collateral review of the original trial pursuant to 28 U.S.C. § 2255 was erroneous. The Court stated that the proper standard was the "cause and actual prejudice' standard. *United States v. Frady*, *supra*, 50 U.S.L.W. at 4392. The Court said:

> We believe the proper standard for review of Frady's motion is the "cause and actual prejudice" standard enunciated in *Davis* v. *United States*, 411 U.S. 233 (1973), and later confirmed and extended in *Francis* v. *Henderson*, 425 U.S. 536 (1976), and *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Under this stand-

> ard, to obtain collateral relief based on trial errors to which no contemporaneous objection was made, a convicted defendant must show both (1) "cause" excusing his double procedural default, and (2) "actual prejudice" resulting from the errors of which he complains.

Id.

After re-examining the case, we hold that the facts in this case satisfy the Supreme Court's "cause" and "actual prejudice" standard. Because Thompson "did not know nor had reason to suspect that the statutory procedure was not being followed, he certainly had cause not to object." We also reaffirm our earlier holding that the "grissly choice" Thompson faced "between life imprisonment and excution facing Thompson provided him with an additional incentive not to appeal. *See Fay v. Noia,* 372 U.S. 391, 439-40 (1963)."

Turning to the element of "actual prejudice," we are satisfied that under the facts of the case "actual prejudice," existed. We reach our holding in light of the facts that the selection of the jury to hear the case of the murder of a police officer was by a fellow law enforcement officer and that the sheriff selected the entire jury panel. The parties stipulated "Sheriff Simmons personally selected potential jurors on the basis of people he knew whom 'he thought would make good jurors.'" *Thompson* v. *White, supra,* 661 F.2d at 105-07.

By placing such a person in charge of selecting the jury, defendant was deprived of due process. As an example of the prejudice that must be shown to satisfy the "actual prejudice standard," the Supreme Court in *Frady* referred to *Henderson* v. *Kibbs,* 431 U.S. 145, 154 (1977),

wherein the Court held that in a collateral attack of a conviction pursuant to 28 U.S.C. § 2254, the contested jury instruction must have "so infected the entire trial that the resulting conviction violates due process." (citations omitted) *United States v. Frady, supra,* 50 U.S.L.W. at 4392.

As we have said previously in this case, "[t]he potential for a conviction prone jury under such a system is substantial. * * * [F]undamental fairness to the defendant requires some method better designed to obtain an impartial jury than the sheriff hand-picking among his acquaintances." (citations omitted) *Thompson v. White, supra,* 661 F.2d at 106 n.7 (quoting *Henson v. Wyrick,* 634 F.2d 1080, 1082-83 (8th Cir. 1980), *cert. denied,* 450 U.S. 958 (1981). Clearly, the taint inflicted on the proceeding by the use of this jury selection technique satisfies the Supreme Court's "actual prejudice" test as outlined in *Frady.*

We reverse the denial of the petition for writ of habeas corpus. The conviction is vacated and we remand for further proceedings, consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DOUGLAS W. THOMPSON, *Petitioner,* v. CARL WHITE, Superintendent, Missouri Training Center for Men, *Respondent.*	No. 77-1122 C (3)

ORDER

This matter is before the Court on the petition of Douglas W. Thompson for a writ of habeas corpus.

After consideration of the United States Magistrate's Report and Recommendation, and petitioner's objections thereto,

IT IS HEREBY ORDERED that the Report and Recommendation of the United States Magistrate be and is SUSTAINED and ADOPTED.

IT IS FURTHER ORDERED that the petition of Douglas W. Thompson for a writ of habeas corpus be and is DENIED and DISMISSED.

Dated this 14th day of January, 1981.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DOUGLAS W. THOMPSON,
Petitioner,

v.

CARL WHITE, Superintendent,
Missouri Training Center
for Men,
Respondent.

No. 77-1122
C(3)

REPORT AND RECOMMENDATION OF UNITED STATES MAGISTRATE

The petition of Douglas W. Thompson for a writ of habeas corpus under 28 U.S.C. § 2254 was referred to the undersigned United States Magistrate for initial review and a recommended disposition. 28 U.S.C. § 636(b); Rules 4 and 10, Rules Governing § 2254 Cases, 28 U.S.C. foll. § 2254.

Petitioner Thompson, a Missouri State prisoner, commenced this habeas action alleging that his 1966 conviction in Mississippi County, Missouri for the murder of a peace officer is constitutionally infirm. He was originally convicted of the same offense in the Circuit Court of Bollinger County[1] in 1961 and sentenced to death. The conviction and sentence was affirmed on direct appeal. *State of Missouri* v. *Thompson*, 363 S.W.2d 711 (Mo. en banc 1963) (*Thompson* I).

[1]As shown below, the killing occurred in Cape Girardeau County, but the case was transferred to Bollinger County on a change of venue.

In 1964 Thompson filed a motion for post-conviction relief under Missouri Supreme Court Rule 27.26. Ultimately the Missouri Supreme Court vacated the sentence and conviction on the ground that the state had suppressed material evidence, *i.e.* cartridge cases found at the scene of the shooting and in the petitioner's automobile. *State of Missouri* v. *Thompson*, 396 S.W.2d 697 (Mo. en banc 1965) (*Thompson* II). Thompson was retried in 1966, convicted, and sentenced to life imprisonment. No appeal was filed.

On September 10, 1975, Thompson filed another motion for relief from the 1966 conviction under Rule 27.26. In this motion he alleged that (1) his conviction was obtained by the deliberate use of false and perjured testimony, which allegation included the argument that he was not convicted upon substantial or sufficient evidence; (2) his conviction violated the prohibition against double jeopardy; (3) the jury was unconstitutionally selected; (4) the jury was improperly instructed on the law of the case; and (5) the trial court refused to provide him with a copy of the jury instructions. The motion, and its subsequent amendment, were not ruled until June 22, 1977 when relief was denied without a hearing. The Missouri Court of Appeals affirmed the denial of relief on all issues, except the issue of whether the jury was unconstitutionally selected. This issue was remanded for an evidentiary hearing. *Thompson* v. *State of Missouri*, 576 S.W.2d 541 (Mo.App. 1978) (*Thompson* III). In so ruling, the appellate court determined from the record that petitioner's failure to appeal the 1966 conviction was a deliberate, voluntary, and knowledgeable bypass of his right to appeal in order to avoid the possibility of the death penalty after yet another trial. Such bypass, the court ruled, disposed of petitioner's allegations of instructional error and of the failure

to provide him with a copy of the instructions. 576 S.W.2d *at* 547, 548. The Court ruled the remaining contentions on grounds other than procedural bypass. The Court determined that Thompson's allegation of the knowing use of perjured testimony was factually identical to the allegation treated by the Missouri Supreme Court in 1965 and that it was precluded by that earlier ruling. *Id. at* 548. The Court ruled that the claim of insufficient evidence was not cognizable under Rule 27.26. *Id., at* 549. And the Court overruled the double jeopardy claim upon the trial record. *Id.*

On October 21, 1977, Thompson filed the instant petition for federal habeas relief. In this petition he alleged (1) that the prosecution knowingly used perjured testimony against him in the 1966 trial, (2) that the conviction was not supported by credible evidence, (3) that the conviction violated the prohibition against double jeopardy, (4) that the jury was improperly drawn, and (5) that newly discovered evidence established his innocence. *Thompson* v. *White*, 591 F.2d 441, 443 (8th Cir. 1979) (*Thompson* IV). The District Court dismissed the petition for failure to exhaust available state court remedies. The Court of Appeals affirmed the dismissal of the claim that the jury was unconstitutionally selected, but reversed as to the other grounds for relief. *Id.*

On February 26, 1979, Thompson filed an amended federal habeas petition restating his claims: (1) that he had been denied due process because the prosecution knowingly obtained his conviction by the use of false and perjured testimony on the part of Police Officers Robert Ross, Hugo Lang, and Shannon Kelley; (2) that the state's evidence was totally devoid of evidentiary value in that it violated the physical laws of nature and was based upon fabrication and perjury; and (3) that the conviction vio-

lated a prohibition against double jeopardy because the prosecution engaged in bad faith conduct to convict him by any means. On May 1, 1979, respondent asserted certain procedural defenses to petitioner's claims, including the deliberate bypass of state court remedies (by petitioner's failure to appeal the 1966 conviction) and the concurrent sentence doctrine.[2]

Following the referral of this action to the undersigned United States Magistrate for review, the undersigned ordered the production of the transcript of the 1966 trial. Except for pre-trial matters, the trial record had never been transcribed. Respondent submitted the transcript on December 6, 1979.

On March 10, 1980 Thompson moved for the removal of the jury selection issue from the state courts to the federal district court and on March 6, 1980 he requested an evidentiary hearing in this court on all pending issues, including the jury selection issue. On May 21, 1980 this motion was granted and evidence was received on July 16 and 26, 1980. On October 14, 1980, a written stipulation of fact was filed by the parties on the jury selection issue.

I. *Respondent's Procedural Defenses.*

Respondent has asserted that petitioner's claims to habeas relief should not be considered on their merits because (1) petitioner by-passed his state court appeal following the 1966 conviction, (2) he delayed for nine years his collateral attack upon this conviction to the respondent's prejudice, and (3) he is currently serving a life sentence on an independent murder conviction.

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[2]Thompson was convicted in Butler County of an unrelated murder in 1961.

(1) *Intentional bypass.*

Respondent argues that the principles of comity and federalism require that this Court not consider petitioner's claims because he waived his right to appeal his 1966 conviction to the Missouri appellate courts.

After considering the evidence adduced on this issue, including the testimony of petitioner and of his retained counsel in the 1966 trial, the undersigned finds that petitioner did voluntarily and knowingly waive his right to appeal the 1966 conviction and sentence. Immediately after the jury verdict was renderd the court indicated it would proceed to sentence petitioner. Defense counsel conferred with petitioner, his father, and an attorney who was assisting the defense counsel. Their concern was that the court would reimpose the death penalty. Petitioner authorized his defense counsel to inform the court that, if the death penalty was not imposed, petitioner would not appeal. The court rejected this offer and imposed a life sentence. Petitioner then was resolved not to file a motion for a new trial, knowing this was tantamount to waiving his right to appeal. Petitioner's motivation was to avoid the possibility of a death penalty upon retrial, if this conviction was overturned, and to avoid putting his family to further expense in continued defense efforts. At no time did defense counsel advice petitioner that, if he did not appeal the conviction, he would receive a life sentence. Defense counsel also never advised petitioner that if he did not appeal, the charge of murdering Officer Crittendon[3] would be dismissed. This charge had already been dismissed prior to the 1966 trial. *See* Transcript of testimony of James B. Herd, filed August 11, 1980, pp. 31-43, 54-56, 60, 72-74.

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[3]The 1966 conviction was for the murder of Officer Goss. Another officer, Donald Crittendon, was also killed in the incident. Co-defendant Sammy Aire Tucker was convicted on Crittendon's murder and executed.

The general principle asserted by respondent is that a federal court will decline to rule on a question of federal constitutional law arising out of a state conviction where the state court declined to decide the question because it was not presented in accordance with the applicable state court procedures. *Wainwright* v. *Sykes*, 433 U.S. 72, 81-82 (1977); *Fay* v. *Noia*, 372 U.S. 291 (1963); *Francis* v. *Henderson*, 425 U.S. 536 (1976). The only claims to which this principle applies in this case are the allegations that the trial court incorrectly instructed the jury and refused to give petitioner a copy of the jury instructions. In *Thompson* III the Missouri Court of Appeals declined to review only these claims because of petitioner's failure to take a direct appeal. These claims have never been made in this federal habeas action. Petitioner's claims of the knowing use of perjured testimony, insufficient evidence to support the conviction, a violation of the proscription against double jeopardy, and newly discovered evidence of innocence were all considered by the state appellate court and denied on other grounds. *Id., at* 548-49. Therefore, respondent's assertion of deliberate bypass by reason of petitioner's failure to appeal is not a bar to the resolution of the merits of these habeas claims.

The only habeas claim which was not considered on the merits by the Missouri Court of Appeals is the claim of unconstitutional jury selection, which was remanded for an evidentiary hearing. This claim also, respondent argues, should not be determined by this Court on the merits because of the failure of defense counsel to object at trial to the composition of the venireman panel. The Missouri Court of Appeals, in its remand of this issue for a hearing, recognized this fact as possibly dispositive:

> We have the view that challenges to the composition of the petit jury array are subject to the rule of pre-

> clusion by failure to object timely, at least where the information indicating discriminatory selection was available, as a practical matter, at the time of trial.

Thompson II, *supra, at* 549. There are two difficultes with respondent's argument. First, this claim was removed to this Court from the Missouri courts before disposition. Whether the state courts would have refused to entertain the claim on its merits is left to speculation. Second, as the parties have now attested, the procedure used to select the venireman panel for the 1966 trial was other than the usual procedure prescribed by Missouri statutes, by special venire facias summons. *See* § 494.290 RSMo 1959. There is no indication in the record, including the testimony of defense counsel James Herd at the federal habeas hearing, that he knew this procedure was used. He testified that he was unaware of any basis to challenge the venire panel. *See* Transcript of testimony of James B. Herd, filed August 11, 1980, p. 62. Upon this record the Court believes that the bypass doctrine is not properly invoked to prevent a determination of this claim on its merits.

(2) *Nine year delay.*

Respondent argues that because Thompson did not challenge the December 1966 conviction until September 10, 1975, when he filed a motion for post-conviction relief under Missouri Supreme Court Rule 27.26, the state has been prejudiced in its ability to defend against these habeas claims. *See* Rule 9(a), Rules Governing § 2254 Cases in the United States District Courts, 28 U.S.C. following The undersigned disagrees. The Court has

II. *Merits of Petitioners' Claims.*

(1) *Sufficiency of the evidence.*

Thompson's first substantive claim for habeas relief is that the state's evidence was insufficient to sustain his

conviction because it violated the physical laws of nature and was based upon fabrication and perjury. Putting aside until part (2) below, his allegations of fabrication and perjury, the proper standard for determining whether the evidence is sufficient to support a state criminal conviction is

> whether after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

Jackson v. *Virginia*, 443 U.S. 307, 319 (1979). The application of this standard does not include a determination of whether or not the jury in Thompson's case *should* have reached a determination of guilt; the court's duty is to determine whether the record contains legally sufficient evidence by which any rational trier could have convicted him. *Id.*, 319-20 n.13.

Thompson was convicted of murder in the first degree in violation of § 559.010 RSMo 1959. The elements of the offense required that the killing be willful, deliberate and premeditated. These elements may be established by circumstantial evidence. *State of Missouri* v. *Thompson*, 363 S.W.2d 711, 741 (Mo. en banc 1963).

See in the light most favorable to the state, the evidence offered during the 1966 trial indicated the following facts: On March 10, 1961, at approximately 9:00 p.m. a suspicious Oldsmobile automobile was observed on a parking lot in Cape Girardeau, Missouri. Police officers in two vehicles pursued the Oldsmobile which was driven by Sammy Aire Tucker, and in which petitioner Thompson was the only passenger. The Oldsmobile was stopped by the police on the east shoulder of Highway 61 heading north from Cape Girardeau. The first police vehicle was driven by Officer Donald Crittendon; Auxiliary Police

Officer Herbert L. Goss and Officer Hugo Lang rode as passengers. Crittendon stopped his vehicle a few feet behind the Oldsmobile. Crittendon exited the police vehicle and walked up to the driver's side of the Oldsmobile and began to question the driver. Officer Goss positioned himself at the right rear of the Oldsmobile and Officer Lang began looking into the left rear window of the Oldsmobile. The second police vehicle was driven by Officer Shannon Kelley; Officer Robert F. Ross rode as a passenger. Kelley drove his vehicle past the Oldsmobile and the first police vehicle on Highway 61, made a u-turn, and proceeded south to a position opposite the highway from the other two vehicles. Tucker, the driver of the Oldsmobile, fatally shot Officer Crittendon in the stomach without warning and began firing at the officers across the road. At the same time Crittendon was shot, shots were heard on the passenger's side of the Oldsmobile. Thompson had been seen standing on the outside of the Oldsmobile on the passenger's side facing Officer Goss. One of the gunshots went through both of Goss's legs near the knees. Goss ultimately died from loss of blood. Thompson was convicted of murdering Goss.

Testimony of Robert Ross.

Robert Ross testified that just before shots were fired he observed Thompson raise up off the front passenger's seat, open the passenger door, and back out of the vehicle. Thompson had his hands down in front of him. Just as the Oldsmobile driver opened his door, Ross saw Thompson pull a weapon from his waistband. Ross then saw two flashes over on the passenger's side of the vehicle. None of the police officers had their weapons drawn at that time. (Tr. 277). Ross next saw Officer Goss laying in the driveway to the rear of the Oldsmobile on his back, with his feet to the west and his head to the east. (Tr. 278).

Tucker then quickley drove the Oldsmobile from the scene with Thompson barely able to reenter the vehicle.

On cross-examination Ross testified that the highway was constructed of concrete and the shoulder of grass and gravel. A drainage ditch was adjacent to the shoulder. The Oldsmobile was stopped in a residential driveway, just off the pavement and parallel to the road. The first police vehicle was stopped just behind the Oldsmobile in the next driveway, also just off the pavement of the highway. The driveways were made of gravel. He remembered that Thompson exited the vehicle before any shots were fired. When Officer Crittendon moved forward to allow the driver to exit the Oldsmobile, Officer Lang was then at the left rear of the Oldsmobile. Thereafter, he did not know where Officer Lang went. Ross testified that when Thompson drew his weapon on the passenger's side of the Oldsmobile, Thompson was standing not more than a step from Officer Goss. (Tr. 289.) Goss was standing two or three steps east of the Oldsmobile facing west. Ross was unable to estimate in feet the distance between Goss and Thompson at the time Goss was shot. Ross testified that he did not know how many shots Officer Kelley fired or whether Officer Lang fired any shots. The only first aid he remembers being administered to Goss, before an ambulance arrived at the scene, was given by a woman who came out of her home with blankets. (Tr. 301.) When shown Defendant's Exhibit C, a photograph depicting Officer Goss as he laid on the ground covered with a blanket and with his head on a pillow, Ross testified that there was no pillow or sheet at the scene when Officer Crittendon was taken to the hospital by Kelley and before the ambulance came to pick up Goss.

On cross-examination Ross further testified that on page 4 of the written statement he gave police he stated

that Officer Goss's wound did not appear serious and, therefore, there was no need for first aid. Later, Officers Ross and Kelley participated in the extensive search for Thompson and Tucker. Ross further testified that he did not see Thompson actually fire his weapon. Rather, he saw a pistol in Thompson's hand, saw Thompson whirl, and point the pistol. The Oldsmobile's seat and doorpost prevented him from seeing the shot being fired. He saw no part of Thompson's forearm. (Tr. 311.) However, he did notice that Thompson's arms were both extended, his right arm was bent at the elbow, and he was standing straight up. (Tr. 313). It appeared that the pistol in Thompson's hand was in "a normal position". (Tr. 314). He testified that the lower portion of Thompson's wrist would have been approximately 41 inches above the ground. (Tr. 314-15.)

On cross-examination Ross further testified that he recalled his March 11, 1961 testimony during the coroner's inquest. He acknowledged that during that interrogation he did not testify that he observed Thompson draw a pistol or have a pistol in his hand. He testified that the coroner did not ask him that question. (Tr. 319). He testified that nowhere in his written statement to the police did he say that he could see Thompson holding a pistol in his hand or see a pistol in Thompson's waistband. Neither did he say in that written statement that he did not see a pistol in Thompson's possession. (Tr. 324.)

Testimony of Hugo Lang.

Hugo Lang testified at the 1966 trial when Officer Crittendon was examining a paper handed him by the driver of the Oldsmobile, Lang was looking into the back of the Oldsmobile through a window. Lang observed the passenger in the front seat in a prone position. He did not see a weapon in the driver's hand, but heard shooting

from his front. Upon hearing the gunfire he went between the Oldsmobile and the patrol car to the right side of the patrol car and drew his firearm. Lang fired two rounds "at the man who was standing aside of the car on the right side of the Oldsmobile." (Tr. 340.) When Lang last saw Goss, Goss was standing out away from the Oldsmobile ten or twelve feet. Lang went to the rear of the patrol car and crossed the highway, firing one round at the Oldsmobile.

On cross-examination Lang was unable to describe the man he fired at on the passenger's side of the Oldsmobile. (Tr. 353). The headlights of the patrol car were on and eluminating this man. (Tr. 356.) Lang testified that he was in a standing position when he fired his first shot from the level of his belt. He fired as quickly as he could get his pistol out of his holster after he heard the original gunshots.

On cross-examination Lang testified that in his coroner's inquest testimony he stated that he saw the Oldsmobile passenger exit the passenger door and clear it by two or three feet, that he heard shots fired and he went down, and that he then fired two rounds at the man on the right hand side. (Tr. 364.) Lang was further questioned about his police report statement that he had completed looking into the back seat of the Oldsmobile and had started in between the two vehicles before Officer Crittendon asked the driver to step out of the automobile. Lang testified that a portion of the police statement did not accurately record what he saw. (Tr. 370-71.) Lang further testified on cross-examination that after the shooting he went back across the road to Officer Goss. Goss was laying on the right side of the patrol car near the front. He examined Goss and covered him with an overcoat. He did not move Goss before the ambulance arrived. Officer Lang examined the photograph of Goss, Defend-

ant's Exhibit C, and identified the blankets and the pillow which he put under Goss's head. He further testified to the statements he gave in his pre-trial deposition: that he never saw a pistol in Thompson's hand and never saw Thompson fire a pistol.

Testimony of the Physicians.

At trial the state offered the testimony of Dr. Edward D. Campbell and Dr. Thomas A. Lovinggood, who examined Officer Goss at the hospital on March 10, 1961. Their testimony indicated that the gunshot penerated Goss's legs, entering the right leg just above the knee, in a slightly downward trajectory, and exiting the left leg just behind the knee. Dr. Campbell estimated that the point of entry was fifteen to eighteen inches above the ground; Dr. Lovinggood estimated approximately twenty inches above the ground. As it passed through Goss's legs for twenty inches, the bullet dropped approximately one inch in a straight line.

Testimony of Shannon Kelley.

Shannon Kelley testified at the trial that he observed Officer Crittendon speaking to the driver of the Oldsmobile and saw Officer Lang shining his light into the back of the vehicle on the driver's side. Crittendon told the driver to step out; the driver did so and shot Crittendon in the stomach without a warning. Almost simultaneously there were shots on the passenger's side of the Oldsmobile and Officer Goss yelled that he was hit. (Tr. 424.) Kelley testified that at the time Crittendon was shot Lang was standing at the left rear of the Oldsmobile. Kelley told Ross to get down and Kelley began firing across the road at the driver of the Oldsmobile hitting him. The Oldsmobile then sped away. Kelley testified that before Officer Goss was shot he was standing at an angle half facing the Oldsmobile and half facing Thompson (Tr. 427).

Kelley testified that none of the officers had their weapons drawn before the shooting began.

Kelley testified further that one or two days after the shooting he and other policemen returned to the scene to reconstruct the incident. At trial he testified to the placement and location of the bullet holes in the vehicles.

On cross-examination Kelley testified that before the shots were fired he observed Goss standing a few feet away from the back side of the passenger's side of the Oldsmobile. Thompson was standing approximately three or four feet from Goss. (Tr. 448.) He did not see either Goss or Thompson change their positions at any time before the shooting began. When questioned about his prior testimony during the trial of Sammy Aire Tucker that Thompson was speaking with Officer Goss, Kelley testified that he did not recollect whether or not Goss and Thompson spoke with one another. (Tr. 450.)

He testified that after Tucker fired his weapon, he heard two shots from the passenger's side of the Oldsmobile. He testified that he did not know exactly what Officer Land did after he shined his light into the rear of the Oldsmobile and the shots were fired. Ultimately, Kelley took Crittendon to the hospital. Kelley could not remember in what position Officer Goss lay on the ground, but testified that he did not recall Officer Goss making any movements after he was hit and before he fell to the ground. Kelley testified that at no time did he see Thompson with a gun in his hand and never saw gunfire flashes from the passenger's side of the vehicle. He did, however, hear gunshots being fired from that side.

Other State's Evidence.

Further testimony offered by the state described the flight and capture of Tucker and Thompson. When Thompson was ultimately captured, a pistol was recovered.

At the conclusion of the state's evidence defense counsel moved for a judgment of acquittal which was overruled.

Defense Evidence.

The defense offered the testimony of Dr. Melvin C. Kasten who examined Officer Goss on March 10 in the hospital emergency room. He recalled that he testified during the preliminary hearing in the Cape Girardeau Magistrate Court that the bullet trajectory was perpendicular to the legs at its entry point.

Ivan E. McLain testified that as a detective sergeant he searched the Oldsmobile and the person of Sammy Tucker. From Tucker's person there was taken a receipt for the purchase of a Walther P-.38 pistol.

Donald A. Kremer, a professional photographer, testified that at about 9:30 p.m. on March 10, 1961, he drove by the scene of the shooting shortly after the incident, sped home for his camera, and quickly returned. As he passed the scene the first time, he observed a person lying near the road who was not covered in any way. When he returned to the scene this person had been covered and a pillow placed under his head. This position was approximately the same as when he first saw the person (Tr. 568). He photographed Officer Goss laying on the ground.

The defense also offered excerpts of the transcript of the testimony of Ross and Lang at the coroner's inquest and excerpts from their police statements.

The defense offered the testimony of Gerald Dreifke, a professor of electrical engineering. He testified at the trial as an engineering expert concerning the distance from which the pistol would have to be held, given the substantially horizontal trajectory of the bullet through Gross's

legs and the nearness of this trajectory to the ground. He testified that the person firing the weapon would have to hold the weapon approximately twenty feet from the person being shot in order to produce the path that the bullet took through Goss's legs. (Tr. 601.) On cross-examination Dr. Dreifke was asked to assume that the gun was held 41 inches above the ground and eight feet from the outside of Goss's right leg. To this hypothetical question he answered that there would be a drop of two and one half inches in the trajectory of the bullet through the legs. If the weapon were held 35 inches above the ground and twelve feet from the outside of Gross's leg, the bullet would drop 1.4 inches. (Tr. 606, 611-12.)

Missouri State Highway Patrolman Kenneth Miller testified as a ballistics expert. He examined the four weapons seized from Tucker and Thompson and the empty cartridges recovered from the scene of the shooting and from the Oldsmobile. It was his opinion that all eight of the expended cartridges were ejected from the Walther P-.38 weapon. (Tr. 627.)

DISCUSSION

Thompson contends that he did not fire the shot that killed Officer Goss and that it was physically impossible for him to do so from their relative positions, as established from the state's evidence. He argues that the evidence indicates that he was standing and that he had a weapon at waist heighth from the ground. It is his contention that Officer Lang mistakenly shot Goss as he was moving around the police vehicle. However, the jury was presented with evidence which indicated that Thompson had alighted from the Oldsmobile on the passenger's side, was near to and facing Officer Goss when Goss was shot, that he had a firearm in his hand at the time of the shooting, that there were gunfire flashes on the passenger's

side of the vehicle, that no officer had drawn his weapon until after the shooting, that he fled from the scene of the shooting, and that he eluded capture for several days. Such circumstances tend to establish Thompson's guilt.

His arguments of witnesses' incredibility and of physical impossibility must be considered in connection with the totality of the circumstances which were presented in evidence to the jury: that the shooting occurred at night and was followed by great excitement and hurried activity, and that no one testified that he saw Goss' position at the precise time he was wounded. At most, the witnesses testified to Goss' location before and after he was shot. The arguments that Thompson makes in this habeas action were presented to the jury, but the jury resolved the issues against him. Upon this record the conclusion is inescapable that a rational trier of fact could have found beyond a reasonable doubt that Thompson murdered Goss.

(2) *Knowing Use of Perjured Testimony*

A criminal defendant is denied due process of law under the Fifth and Fourteenth Amendments by the prosecution's knowing use of false material evidence. *Giglio* v. *United States*, 405 U.S. 150 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269 (1959); *Mooney* v. *Holohan*, 294 U.S. 103, 112 (1935). The prosecutor's knowledge that the evidence is false must be established by petitioner. *United States* v. *Runge*, 593 F.2d 66, 73-4 (8th Cir. 1979). And mere inaccuracies in the evidence are an insufficient basis for relief, *United States* v. *Glover*, 588 F.2d 876, 879 (2nd Cir. 1978).

Thompson alleges that the prosecutor in the 1966 trial knowingly used the false testimony of Police Officers Ross, Lang, and Kelley. He alleges that they lied when testifying to such facts as where Officer Goss stood, where his body lay after he was shot, and Officer Lang's lo-

cation during the shooting. The 1966 trial record indicates that the officers' trial testimony, the coroner's inquest testimony, and the statements to the investigating police contained certain discrepancies. These discrepancies were placed before the jury during the trial. By itself, this evidence does not rise to the level of self-evident perjury that was known to be false by the prosecutor. There is no other evidence in this record that involves the 1966 trial prosecutor in the knowing use of perjured evidence. This ground for relief is without merit.

(3) *Newly Discovered Evidence.*

Thompson alleges that in 1978 he acquired new evidence which indicates that Officers Kelley, Ross and Lang lied at both of his trials. At his hearing on July 16, 1980, petitioner testified that this evidence was (1) a photograph of Officer Goss as he lay wounded on the roadside (Hearing Exhibit No. 1); (2) a copy of a police report, which included a description of the police reenactment of the crime scene (Hearing Exhibit No. 2); and (3) eight photographs of the crime scene as reenacted by police (Hearing Exhibit No. 3). This evidence, he argues, supports his testimony at the initial trial and proves that the police changed their stories. He states as follows concerning the contents of this police report:

> They further agreed, as did an impartial bystander, the later coroner of the county, that the deceased fell to the ground exactly where he stood and was never moved from his falling position until the ambulance came to pick him up and take him to the hospital.
>
> Thus, if the deceased fell and lay on the road edge, head toward the gutter between the cars, then he stood out in the pavement on the driver's side of

the Oldsmobile, or in an area where it was impossible for petitioner to have shot him because the Oldsmobile was between petitioner and deceased. Thus, a look to the contents of the official police investigation report petitioner just acquired last July should clear up the issue of whether petitioner told the truth or the police did. In this report the following is taken verbatim . . . :

> "The cars were located [during the March 21, 1961 reenactment] for photographing according to locations agreed on by Patrolman Shannon Kelley and Auxiliary Hugo Lang. *The relative positions of the cars were also based upon the spot were Goss had fallen. The spot was indicated and can be seen in the developed photographs as a gravel-covered spot between car 2 and the Oldsmobile.*"
>
> Thus, their own police investigation report proves they lied to the jury on the most crucial issue on the case, where the deceased stood and fell. Their testimony, not only was false, it completely destroyed petitioner's truthful testimony at the first trial to such an extent their perjury caused petitioner to forego his constitutional right to testify in his own behalf at the second trial. (Emphasis included.)

(Traverse filed May 15, 1979, page 13.) He argues that this report establishes that the officers told the investigators one thing, then took the stand and testified to contrary facts. (Petitioner's reply filed May 2, 1980, p. 7.)

Petitioner's argument is insufficient in light of the record. What Thompson describes as newly discovered evidence was seen or used by defense counsel during the 1966 trial. The photograph submitted by Thompson in support of the instant petition, which shows Goss laying on

the ground, pillow under his head and covered, does indeed apear to indicate that his feet are on the hard surface of the highway while the rest of his body, from the area of his knees to his head, lay on the shoulder of the road near a graveled area. This photograph was introduced into evidence during the 1966 trial. *See* Transcript of Petitioner's testimony on July 16, 1980, pp. 32-33; Transcript of James B. Herd's testimony on July 26, 1980, p. 47; and Hearing Exhibit No. 1. It also reflects Ross' testimony that Goss lay in the driveway to the rear of the Oldsmobile, head to the east, feet to the west. The eight photographs of the renacted crime scene were used by defense counsel during the 1966 trial. *See* Herd Testimony, p. 50. Although the police report did not come to light until after the trial, *id. at* 48-49, much of the information it contained was used during the trial, *id. at* 49. The arguments made by Thompson in this petition were the same arguments made to the jury by his counsel in his closing summation. Thompson's use of this evidence to support his theory of defense adds nothing to the record which was not presented to the jury. This evidence is not newly discovered and does not establish that the prosecutor knowingly used false evidence. Therefore, such evidence is not a sufficient basis for federal habeas relief. *Townsend* v. *Sain*, 372 U.S. 293, 317 (1963).

(4) *Double Jeopardy.*

Petitioner alleges that his constitutional right not to be placed in jeopardy twice for the same offense was violated because the state prosecutors engaged in bad faith to convict him by any available means.

It is petitioner's contention that the Fifth Amendment prohibition against Double Jeopardy.

> forecoses the State of Missouri from further harrassment of petitioner of successive prosecutions which

would force petitioner to accept the services of court-appointed counsel and not counsel of petitioner's own choosing because the illegal actions complained of herein have completely depleted petitioner's resources or means of retaining a lawyer from out of the Southeast Missouri area that is not under the influence of the law enforcement officials in Cape Girardeau, Missouri.

(Amended Petition filed February 26, 1979.)

The Fifth Amendment's prohibition against placing a criminal defendant twice in jeopardy for the same offense applies to the states through the Fourteenth Amendment. *Benton* v. *Maryland*, 395 U.S. 784, 794 (1969). Following the reversal of his 1961 conviction, petitioner was retried for the same offense. The reason for the retrial was the suppression of evidence by the prosecution. In its reversal the Missouri Supreme Court did not determine that the evidence was insufficient to support the conviction. Under these circumstances there was no acquittal for double jeopardy purposes and the state was empowered to try petitioner again. *United States* v. *Scott*, 437 U.S. 82 (1978); *Sedgwick* v. *Superior Court*, 584 F.2d 1044, 1049-50 (D.C. Cir. 1978), *cert. denied*, 439 U.S. 1075 (1979).

Petitioner's substantive allegations do not state a claim for relief for a violation of double jeopardy. Rather, they are relevant to his other constitutional claims which have been considered and overruled above.

Petitioner's reliance upon Justice Rehnquest's statement in *Divans* v. *California*, 434 U.S. 1303 (1977), that double jeopardy protects a defendant from bad faith on the part of the prosecutor, citing *United States* v. *Jorn*, 400 U.S. 470, 485 (1971), is misplaced. That proposition is drawn from a line of cases involving the granting of a pre-verdict mistrial caused by the acts of a prosecutor.

The strong interest of the defendant in having the trial concluded by a particular tribunal requires that "the prosecutor must demonstrate 'manifest necessity' for any mistrial declared over the objection of the defendant." *Arizona* v. *Washington*, 434 U.S. 497, 505 (1978). Such an interest is not at issue here and the prohibition against double jeopardy is not violated when a criminal conviction is reversed on the defendant's appeal and the charge is retried. *Cf., Green* v. *United States*, 355 U.S. 184, 189 (1957).

Therefore, petitioner's fourth ground for habeas relief is without merit.

(5) *Improper jury selection.*

Petitioner originally alleged that the panel of jury veniremen selected for his trial were not drawn from a cross-section of the community. As the case developed, the allegation has become that the panel was not selected according to the procedures called for by the Missouri statutes and there was discrimination against the selection of blacks.

Petitioner and respondent, by their stipulation filed on October 14, 1980, agreed that the jury panel which tried petitioner in 1966 was personally selected by the Sheriff of Mississippi County. In December 1966 the Circuit Court issued a special venire facias order to the Sheriff to summon seventy-two citizens of Mississippi County for service on petitioner's trial. *See* § 494.290 RSMo 1959. In executing this order the Sheriff prepared and served summonses on persons who were at least twenty-one years old, whom he believed would answer the voir dire questions truthfully, and who had no criminal convictions. The Sheriff did not pick the veniremen's names from the master jury list. This panel of veniremen included seven black

persons. When he selected the jury members, the Sheriff knew that the case involved the killing of a police officer. The jury was not selected according to the random selection process generally provided for in Chapter 494 of the Revised Statutes of Missouri (1959).

It is well established that, although petitioner Thompson is white, he has standing to complain of a jury selection procedure that is racially discriminatory. *Peters* v. *Kiff*, 407 U.S. 493 (1972). His original allegation, that the venireman panel did not reflect a cross-section of the community, does not state a claim for relief. This is so because a criminal defendant is not entitled to a jury that includes persons from the various segments of our society. Rather, he is entitled to a jury from which persons from various groups are not unlawfully excluded. Proper jury selection contemplates

> an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community; frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. (Citation omitted.)

Thiel v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946). A state court criminal conviction cannot stand if it is based upon a verdict of a petit jury from which black persons were excluded by reason of their race. *Whitus* v. *Georgia*, 385 U.S. 545, 549-50 (1967). It is the petitioner's burden to prove purposeful discrimination. He may do so by a prima facie case of population figures and statistics. If a prima facie case is made, the burden shifts to the prosecution to establish that no purposeful discrimination occurred. *Id., at* 550.

Petitioner has not made out a prima facie case of discriminatory jury selection. No evidence indicated an express discriminatory intent. The facts as stipulated indicate the use of a "key man" selection system in which the Sheriff, without reference to any master list, simply selected 72 persons known by him to make up the venire panel. Such "key man" systems are suspect because of the inherent possibilities for abuse. *Henson* v. *Wyrick*, No. 79-1808, slip op. (8th Cir., November 12, 1980). When the existence of such a system is proved along with figures which indicate a constitutionally significant disparity between the proportion of blacks in the population and the proportion of blacks on the first level of juror selection, a prima facie case of racial discrimination has been made. *Ross* v. *Wyrick*, 581 F.2d 172, 174 (8th Cir. 1974).

Population figures indicate that in 1970 21.16% of the total population of Mississippi County was black. *Ross* v. *Wyrick, supra at* 173. Of the eligible jurors in 1970, 14.5% were black. *Id.* Of the 72 veniremen selected by the Sheriff, 7 or 9.72% were black. Depending on whether the black population or the black eligible jurors are used for comparison, the differences between these percentages and the percentage of blacks represented in the first "jury pool", here the venire panel, are 11.44% (21.16%-9.72%) and 4.78% (14.5%-9.72%). In *Ross* the same comparisons resulted in differences of 17.78% and 11.08%, respectively. *Ross, supra, at* 174. It is the opinion of the undersigned that the differences present here, fall sufficiently short of *Ross* to preclude the finding of a prima facie case of unconstitutional discrimination. In *Swain* v. *Alabama*, 380 U.S. 202 (1965), the jury roll consisted of the subjective selections of moral persons over the age of 21 by three jury commissioners. Venires drawn from this roll were apparently selected at random. The Court held that:

We cannot say that purposeful discrimination based

> on race alone is satisfactorily proved by showing that an identifiable group in a community is underrepresented by as much as 10%. . . . Undoubtedly the selection of prospective jurors was somewhat haphazard and little effort was made to ensure that all groups in the community were fully represented. But an imperfect system is not equivalent to purposeful discrimination based on race. We do not think the burden of proof was carried by petitioner in this case.

Swain, supra at 208-209. The only differences between the procedure followed in the instant case and the procedures followed in *Swain* and in *Ross* are that no master list was employed and the subjective selections were made by a sheriff rather than by a jury commissioner. The record does not indicate any increase in the likelihood of racial discrimination caused by these differences. Finally, there is no indication that the Sheriff was in any way interested in the investigation or prosecution of the case as was the case in *Henson* v. *Wyrick, supra.*

It is the opinion of the undersigned that the basis of petitioner's complaint focuses more on the "key man" system employed here rather than the exclusion of blacks from the venire panel. At the hearing before the undersigned on July 16, 1980, defense counsel testified that while he did not recall using his preemptory challenges to strike blacks from petitioner's jury, he did recall that it was his considered desire not to have any black person on the petit jury. This was because he and local counsel retained to aid in the selection of the jury believed that black jurors in the community would be guided in their voting by the desires of the white jurors. *See* Herd testimony, p. 62-66. While this testimony may not affect the significance of the percent of underrepresentation of blacks on the venire panel, it does support the conclusion that

the gravamen of petitioner's complaint is the "key man" system rather than the exclusion of blacks.

There is, however, nothing *per se* unconstitutional about the "key man" system. *Carter* v. *Jury Commission*, 396 U.S. 320, 331-337 (1970). It is only when that system is coupled with a sufficient indication of actual discrimination that a prima facie case of an unconstitutional selection procedure has been made. *Id.* In the circumstances of this case, it is the opinion of the undersigned that the 11.44% or 4.78% disparity is insufficient to established a prima facie case. *Cf.*, *Trotter* v. *Stephens*, 241 F.Supp. 33, 42-44 (E.D. Ark. 1965).

Petitioner also argues that a prima facie case is made by a showing that state law regarding the use of random jury selection procedures was not followed in the selection of the jury which convicted him. Such a violation, however, does not amount to a federal constitutional error unless there is a showing of exclusion of an identifiable group. *See Cobbs* v. *Robinson*, 528 F.2d 1331, 1341-1342 (2nd Cir. 1975), *cert. denied*, 424 U.S. 947 (1976), and cases cited there. For the same reasons stated above, it is the opinion of the undersigned that there was not a sufficient exclusion to support this claim.

RECOMMENDATION

For the reasons set out above, it is the recommendation of the undersigned United States Magistrate that the petition of Douglas W. Thompson for a writ of habeas corpus be denied without further proceedings. The parties

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[4]The method by which petitioner's venireman panel was selected and summoned is authorized by state law under certain circumstances on which no evidence has been adduced. See § 494.290 RSMo. 1959.

are advised that they have fifteen days within which to file writen objections to this Report and Recommendation.

Respectfully submitted,

David D. Noce
UNITED STATES MAGISTRATE

Date this 17th day of December, 1980.

APPENDIX D

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI

EASTERN DIVISION

DOUGLAS W. THOMPSON, *Petitioner,* v. CARL WHITE, Superintendent, Missouri Training Center for Men, *Respondent.*	No. 77-1122 C (3)

ORDER

The petition of Douglas W. Thompson for a writ of habeas corpus was denied by this Court on January 14, 1981. On appeal to the United States Court of Appeals for the Eighth Circuit that denial was reversed and the case remanded for a new trial. The State of Missouri appealed that decision and the United States Supreme Court granted certiorari, vacated the judgment, and remanded the case to the Court of Appeals for further consideration in light of *United States* v. *Frady*, 50 U.S.L.W. 4388 (1982). After reconsideration, the Court of Appeals again decided that the petition for writ of habeas corpus should be granted, the conviction of petitioner vacated, and the case remanded for a new trial.

This matter is before the Court pursuant to the mandate of the United States Court of Appeals for the Eighth Circuit filed in this Court on June 4, 1981.

Accordingly,

IT IS HEREBY ORDERED that the petition of Douglas W. Thompson for a writ of habeas corpus be and is GRANTED.

IT IS FURTHER ORDERED that petitioner's conviction by the Circuit Court of Mississippi County, Missouri is VACATED.

IT IS FURTHER ORDERED that unless a new trial is granted to petitioner by the State of Missouri and commenced within sixty (60) days of the date of this order, or within such additional time as may be granted for good cause shown in writing before the expiration of the time stated, petitioner shall be discharged from the subject charge against him and any obligation thereunder.

Dated this 14th day of June, 1982.

Edward L. Filippine
UNITED STATES DISTRICT JUDGE

IN THE

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

DOUGLAS W. THOMPSON, *Petitioner,* v. CARL WHITE, Superintendent, Missouri Training Center for Men, *Respondent.*	**No. 77-1122 C (3)**

MOTION FOR ADDITIONAL TIME WITHIN WHICH TO COMMENCE PROSECUTION OF PETITIONER

Carl White, Superintendent, Missouri Training Center for Men, respondent herein, by Attorney General John Ashcroft, State of Missouri, respectfully requests, pursuant to the Suggestions which follow, that the State of Missouri be granted additional time within which to commence prosecution of petitioner so that respondent may petition for a writ of certiorari in the United States Supreme Court to review the latest decision of the Eighth Circuit in this case.

SUGGESTIONS

This court issued an opinion in this case on June 14, 1982, in which the pertinent history of this litigation was chronicled. Pursuant to the most recent decision of the Eighth Circuit in this case this court ordered that the petition of Douglas W. Thompson for writ of habeas corpus be granted, that his Mississippi County Circuit Court conviction be vacated, and that a new trial be commenced within sixty days of the date of the order "or within such addi-

tional time as may be granted for good cause shown in writing before the expiration of the time stated. . . ."

On April 26, 1982, the United States Supreme Court granted White's petition for a writ of certiorari and vacated the Eighth Circuit decision in this case dated October 14, 1981, and remanded to Eighth Circuit for further consideration in light of *United States* v. *Frady*, 50 U.S.L.W. 4388 (1982).

Without further briefing or oral argument the Eighth Circuit issued an opinion on June 4, 1982, pursuant to the August 26, 1982, directive of the United States Supreme Court in which the Eighth Circuit again concluded that Thompson's conviction ought to be reversed, even in light of *United States* v. *Frady*.

Respondent White believes that the Eighth Circuit erred in again reversing this court. White believes that the Eighth Circuit has misconstrued the April 26, 1982, directive of the United States Supreme Court and has incorrectly reconsidered the case in light of *United States* v. *Frady*. For this reason White intends to once again seek certiorari in the United States Supreme Court in an effort to have overturned the most recent decision of the Eighth Circuit in this case. Because the Eighth Circuit issued its mandate immediately upon filing its June 4, 1982, opinion, and in light of this court's June 14, 1982, order directing the State of Missouri to retry Thompson within sixty days, White requests that this court stay any further proceedings in this regard until such time as he has filed a petition for a writ of certiorari in the United States Supreme Court and that court has ruled thereon.

Respondent White has ninety days from June 4, 1982, in which to file a petition for a writ of certiorari in the United States Supreme Court. Title 28 U.S.C. Section 2101(c). Therefore, White respectfully requests this court

delay the effectuation of its order dated June 14, 1982, until such time as respondent files a petition for a writ of certiorari in the United States Supreme Court, and that court has an opportunity to rule thereon; in addition thereto, respondent respectfully requests that should the United States Supreme Court either deny the petition for a writ of certiorari, or affirm the Eighth Circuit opinion after argument of the case on the merits, that this court once again grant respondent an additional sixty days within which to commence prosecution of Thompson.

ENFIN, in light of the foregoing, respondent respectfully requests that this court order a stay delaying any further proceedings in this case, and give the State of Missouri additional time in which to commence prosecution of Thompson, until respondent has filed a petition for a writ of certiorari in the United States Supreme Court and that court has ruled thereon; in addition thereto, respondent respectfully requests that should the United States Supreme Court either rule adversely to respondent on his petition for writ of certiorari or affirm the Eighth Circuit opinion on the merits, that the State of Missouri be given, once again, sixty days in which to begin prosecution of Thompson.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed, postage prepaid, this 22nd day of June, 1982, to:

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